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{ REPORT
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FERC LICENSING OF HYDROELECTRIC PROJECTS ON FRESH WATERS IN HAWAII

MARCH 18, 1999.—Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural
Resources, submitted the following

REPORT

[To accompany S. 334]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 334) to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the State of Hawaii, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE MEASURE

S. 334 precludes the voluntary licensing of hydroelectric projects on fresh waters in the State of Hawaii.

BACKGROUND AND NEED

Part I of the Federal Power Act was enacted in 1920 to establish a “complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation.” *First Iowa Hydro-Electric Coop, v. FPC*, 328 U.S. 152, 180 (1946). Section 4(e) of the Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for hydroelectric projects that (1) are located on waters over which Congress has jurisdiction under the Commerce Clause, (2) are located on public land or a Federal reservation, or (3) use surplus water or power from a Federal dam. Section 23(b)(1) of the Act requires anyone building or operating a hydroelectric project to obtain a FERC license if the project (1) is located on navigable water, (2) is located on public land or a Federal reservation, (3) uses surplus water or

power from a Federal dam, or (4) is located on a body of water over which Congress has jurisdiction under the Commerce Clause, was built after 1935, and affects interstate or foreign commerce.

Although Congress' power to regulate interstate and foreign commerce includes the power to regulate navigation, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824), Federal Commerce Clause jurisdiction is broader than the concept of navigability. *United States v. Appalachian Power Co.*, 311 U.S. 377, 426–427 (1940). Thus, the circumstances in which the FERC may issue licenses under section 4(e) of the Federal Power Act are broader than the circumstances in which developers of hydroelectric projects must obtain a FERC license. As a result, the FERC has the power to issue a license for a hydroelectric project in response to a voluntary application under section 4(e) of the Federal Power Act, even though the applicant is not required to obtain a license under section 23(b)(1) of the Act. *Cooley v. FERC*, 843 F.2d 1464, 1469 (D.C. Cir. 1988).

The State of Hawaii has made a case for a limited exemption from FERC licensing based on Hawaii's unique circumstances. Hawaii's streams are isolated on individual islands and run quickly down steep volcanic slopes. There are no interstate rivers in Hawaii, few if any streams crossing Federal land, and no Federal dams. Hawaii's streams are generally not navigable. Hawaii has a unique body of water law that has evolved from Native Hawaiian custom and a comprehensive regulatory program that protects water resources.

In short, none of the bases for FERC's licensing jurisdiction under section 23(b) of the Federal Power Act appear to exist in Hawaii. Indeed, FERC has never licensed a hydroelectric project in Hawaii and has no application to license one pending.

Nonetheless, as explained above, section 4(e) of the Federal Power Act gives FERC the discretion to license hydroelectric projects in response to voluntary applications even though the project is not required to be licensed under section 23(b)(1) of the Act. The Attorney General of Hawaii has testified that FERC's voluntary licensing authority "can lead to: (1) claim jumping by business competitors; and (2) attempts to use FERC's claimed preemptive authority to override state stream regulation" to the detriment of Hawaii's waters. S. Hrg. 103–924, p. 14 (1994).

In 1991, the Committee on Energy and National Resources favorably reported legislation to eliminate the FERC's voluntary licensing authority over hydroelectric projects on fresh waters in Hawaii as part of its energy policy bill (S. 1220) in the 102nd Congress. S. Rept. 102–72, p. 245. The Senate passed an energy bill (S. 2166) with the Hawaiian exemption in it in 1992, but the provision was substantially rewritten in conference. As ultimately enacted, the provision did not eliminate the FERC's voluntary licensing authority over projects in Hawaii, though it did direct the FERC to study hydroelectric licensing in Hawaii and report to Congress on whether projects in Hawaii should be exempt from FERC licensing.

The FERC submitted its report in 1994. The report did not reach any overall conclusion as to whether the Federal Power Act should be amended to exempt projects on the fresh waters of Hawaii from the FERC's jurisdiction, though it did note that the FERC had never licensed a hydroelectric project in Hawaii.

LEGISLATIVE HISTORY

As noted under “Background and Need,” the Committee on Energy and Natural Resources favorably reported, and the Senate passed, legislation to eliminate the FERC’s voluntary licensing authority over hydroelectric projects on fresh waters in Hawaii during the 102nd Congress, though the provision was substantially amended in conference to preserve the FERC’s current licensing authority and require the FERC to conduct a study on whether Congress should exempt Hawaiian projects in the future.

Following receipt of the FERC study, the Committee again reported legislation to exempt projects on Hawaii’s fresh waters from the FERC’s voluntary licensing authority in 1994 (S. 2384, S. Rept. 103–336), 1995 (S. 225, S. Rept. 104–70), and 1996 (S. 737, S. Rept. 104–77). The Senate passed two of these three measures (S. 2384 in the 103rd Congress and S. 737 in the 104th Congress), though neither became law.

The Committee again passed legislation to exempt these projects in 1998. S. 846 and section 2 of S. 439 in the 105th Congress.) S. 846 was reported by the Committee on October 15, 1997 (Report 105–112), and passed the Senate on June 25, 1998. S. 439 was reported by the Committee on October 15, 1997 (Report 105–111), and passed the Senate on June 25, 1998. No action was taken by the House on either bill. S. 334 is identical to S. 846 and section 2 of S. 439.

COMMITTEE RECOMMENDATIONS

The Senate Committee on Energy and Natural Resources, in open business session on March 4, 1999 by a voice vote with a quorum present, recommends that the Senate pass S. 334 without amendment.

SECTION-BY-SECTION ANALYSIS

S. 334 contains only one section. Section 1 eliminates the FERC’s authority to issue voluntarily requested licenses for hydroelectric projects located on fresh waters in the State of Hawaii.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 9, 1999.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 334, a bill to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the State of Hawaii.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts for this estimate are Kim Cawley (for federal costs), and Lisa Cash Driskill (for the state and local impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 334—A bill to amend the Federal Power Act to remove the jurisdiction of the Federal Energy Regulatory Commission to license projects on fresh waters in the state of Hawaii

CBO estimates that enacting this bill would have no net effect on the federal budget. S. 334 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on the budgets of state, local, or tribal governments. The bill would limit FERC's authority to license certain hydroelectric projects in Hawaii, leaving the state with that authority. Because Hawaii already licenses and regulates these projects, the bill would not require Hawaii to take any action.

S. 334 may have a minor impact on FERC's workload. Because FERC recovers 100 percent of its costs through user fees, any change in its administrative costs would be offset by an equal change in the fees that the commission charges. Hence, the bill's provisions would have no net budgetary impact.

Because FERC's administrative costs are limited in annual appropriations, enacting S. 334 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

The CBO staff contacts for this estimate are Kim Cawley (for federal costs), and Lisa Cash Driskill (for the state and local impact). This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out this measure.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the provisions of the bill. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of this measure.

EXECUTIVE COMMUNICATIONS

No executive communications were received by the Committee on S. 334. Executive communications were received by the Committee on identical legislation in the 105th Congress, S. 846 and section

2 of S. 439, which appear in Senate Reports 105–112 and 105–111 respectively.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing rules of the Senate, changes in existing law made by the bill S. 334, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Federal Power Act

The Act of June 10, 1920, Chapter 285

Part I

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SEC. 4. * * *

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(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which congress had jurisdiction under its authority to regulate commerce with foreign nations and among the [several States, or upon] *several States (except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act), or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advan-*

tageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

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